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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 796

WALTER A. MACK,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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The brief for the United States in opposition to the petition for writ of certiorari warrants a hasty reply.

In its statement of the case, the government urges that overages were paid to Bahlenhorst "at petitioner's

direction" (Br. opp. 5). Record references are made in support of this statement. Two of the references (R. 920, 926) are to the testimony of Revenue Agent McDermott, who did not testify of his own knowledge as to any payments. McDermott was the government's human adding machine and he merely summarized the dollar amounts of the proof which preceded his testimony. The other two record references (R. 608-624, 700-708) are to the witnesses Triffler and Steffes. The former was a self-styled "car gypper" and the latter had been convicted of black marketeering. Neither had any records to support their alleged transactions with W. A. Mack, Inc. Both purported to recall the precise dollar amounts paid for cars purchased eight years before their testimony was given. (See *e.g.* Steffes, R. 703, "$5371.00"; Triffler, R. 616, "4373.00".) Petition denied any knowledge of the Triffler and Steffes transactions. (R. 1308.) His testimony would have been corroborated by the Bahlenhorst affidavit had it been received in evidence.

1. The inquiry and response were coercive.

The government's answer to this point is wide of the mark. It is limited solely to the words of the trial court's "inquiry". It ignores the *response* which that inquiry elicited—a show of hands by 7 or 8 jurors which revealed the identities of the jurors who anticipated a verdict, and those who did not. Following this public segregation, the jurors were admonished to "go back and see if you cannot agree on a unanimous verdict." (R. 1461a.) This *entire procedure* was coercive; not just the trial court's "inquiry".

The government suggests that coercion was avoided because, "The judge expressly cautioned the jury at the outset of the colloquy *against* revealing its numerical division." (Br. opp. 8; R. 1461.) But, the admonition did not

avoid the prejudice. The show of hands occurred. Furthermore, in each case relied upon by petitioner, similar precautions were taken.[1]

Tomoya Kawakita v. *United States*, 190 F. 2d 506, 526 (C. A. 9th), aff'd, 343 U.S. 717, relied upon by the government (Br. opp. 8,), is not at all in point. Indeed, it supports petitioners assertion that the procedure here employed was totally unnecessary. There the trial court studiously avoided any inquiry of the jury despite repeated requests by defense counsel that the jurors be polled as to whether or not they could reach a verdict.

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[1] In **Jordan v. United States**, 22 F. 2d 966, the inquiry and answer were: "The Court: I am not asking you for a division, Mr. Foreman; but I will ask you: is the jury about evenly divided? You can answer that yes or no." "The foreman: Yes, sir."

In **Berger v. United States**, 62 F. 2d 438, the inquiry and answer were: "By the Court: Without interrogating which way you stand, how are you divided numerically?" "By the foreman of the jury: We are uniform on one count." "By the Court: Well, how are you divided?" "The Foreman: 6 to 6."

In **United States v. Samuel Dunkel & Co.**, 173 F. 2d 506, the inquiry was, "May I ask you, Mr. Whitney, I believe it is, without disclosing the way in which the jury stands, can you tell me, are they nearly equally divided as to a question of fact, or is there a majority, a pronounced majority in agreement, with a pronounced majority in disagreement. I think you know what I mean." "The foreman of the jury: There is a majority, very much."

The facts are not spelled out in detail in this Court's opinion in **Brasfield v. United States**, 272 U.S. 448, but the records of the Court reveal that the trial court's inquiry was, "About how are you divided numerically?" To this the foreman replied, "9 to 3." Thereupon the trial court said, "Gentlemen, I do not want the names of anybody who are on either side." (Printed transcript of record, **Brasfield, et al. v. United States**, 243, October term, 1926, at page 95.)

The government's footnote suggestion that the coercive procedure passed without objection, is unimportant. The Court of Appeals has ruled upon this assignment without reference to the timeliness of objection. Furthermore in *Brasfield* v. *United States*, 272 U.S. 448, 450 (1926), this Court, in condemning trial court conduct equivalent to that present here, held, "The failure of petitioner's counsel to particularize an exception to the court's inquiry does not preclude this court from correcting the error. . . . This is especially the case where the error, as here, affects the proper relations of the court to the jury, and cannot be effectively remedied by a modification of the judge's charge after the harm has been done."

The government's further suggestion that the matter was not argued on the motion for new trial is misleading. The hearing on defendant's motion for new trial was perfunctory. (R. 1472, 1473.) But it did include, indeed all it included, was a discussion of jury coercion.

The trial judge's question did infringe upon the secrecy of the jury's deliberations and was coercive. It did not fall within the permissive langauge of the *Brasfield* case relied upon by the government. (Br. opp. 9, f.n. 5.) Here at the time the objectionable coercive events occurred, the trial court knew that the jury had been deliberating for 9 hours, and, through proper inquiry to the foreman, the Court ascertained that the jury was "progressing, but . . . not near any final result" (R. 1461), and that the jury had taken 6 or 8 ballots. (R. 1461a.) This was all the proper administration of justice required the trial judge to know.

The only purpose served by the trial court's inquiry was to disclose the identities of the jurors who believed a verdict would be reached and, conversely, the identities of those who did not. The government has totally failed to answer the possible coercive effects which this occurrence might have had upon the jury, as previously developed by peti-

tioner. (Pet. 11-14.) In the language of this Court, "Its effect upon a divided jury will depend upon circumstances which cannot properly be known to the trial judge or to the appellate courts and may vary widely in different situations, but in general its tendency is coercive. It can rarely be resorted to without bringing to bear, in some degree, serious although not measurable, an improper influence upon the jury. . . . Such practice, which is never useful and is generally harmful, is not to be sanctioned." *Brasfield* v. *United States*, 272 U.S. 448, 450.

In short, the government's answer is confined—as was the opinion of the Court of Appeals—to the argument that the words here spoken by the trial judge differ from those employed by the trial judge in the *Brasfield* case. But as the Court of Appeals for the Second Circuit held in applying the doctrine of the *Brasfield* case, ". . . there seems no justification for advancing fine differentiations resting upon the non-use of specified numbers or upon the nomenclature employed in the isolating of the minority. Practically the possibilities of coercion seem the same; legally it would be undesirable to add to the uncertainties of criminal law administration by such over-refined distinctions." *United States* v. *Samuel Dunkel & Co.*, 173 F. 2d 506, 511.

2. The trial court erred in excluding the affidavit of Bahlenhorst, the corporation's sales manager.

The government makes no response to petitioner's position (Pet. 18) that this statement was "clearly admissible as a declaration against [Bahlenhorst's] pecuniary interest."

The government now concedes (Br. opp. 9) that the affidavit was offered at the deposition. Thus, it admits that its trial counsel misled the trial court. (R. 1177.)

It asserts that "the government's objection at trial was timely, because the *error* was not of the 'kind which might be *obviated, removed or cured* if promptly presented' at the

time the deposition was taken. Even if objection had then been made, the affidavit would still have been incompetent." (Br. opp. 10) emphasis supplied.) This position ignores the fact that the contents of a document constitute evidence, not the document itself. Hence, if an objection had been made at the deposition, it could have been "obviated" by the examination of Rabinkoverat as to the facts recited in the affidavit. However Rabinkoverat was on his deathbed, this direct hand method of interrogation was employed. When the government did not object to the interrogation *and the offer of the affidavit*, defendant was led to believe his method of interrogation was acceptable. When objection was made at trial—and sustained—defendant was deprived of the contents of the affidavit.

The government has pin pointed the crucial aspect of Rabinkoverat's affidavit. (Br. opp. 10.) It characterizes its importance as "superficial" because it could "only" refer to $7,700.00, which it asserts went into the "slush fund". (Br. opp. 11.) The government's argument unjustifiably assumes that the jury would have regarded $7,700.00 as insignificant. It ignores the fact that the "slush fund" to which it refers was Rabinkoverat's, as he testified (R. 1154), "I had a slush fund of my own which I reimbursed from time to time then as I needed it, because I was really looking to the future." If these cash proceeds went into Rabinkoverat's "slush fund" as the government suggests, it was imperative that the jury know of it. It was imperative that the jury know that the cash was not turned over to Walter A. Black or W. A. Black, Inc.

The government suggests that the failure to examine Rabinkoverat in respect to the contents of the affidavit "may well have been deliberate". (Br. opp. 11, fn. 6.) This is predicated upon the unsupported statement that on cross examination Rabinkoverat completely dispelled the impression that he had converted the proceeds of the fictitious commission checks to his own use. Rabinkoverat's cross examination was precisely to the contrary. Thus, at page

1166 of the record, the following questions and answers occurred:

"Q. Then do I understand you to say that you were just guessing at your weekly draw, and whatever you received, which would even it off at the end of the month, was not your money?

"A. Oh, it was my money, yes.

"Q. Well, you stated you didn't receive it?

"A. I said I received it but I had no—I knew I wasn't going to keep it. I knew the purpose that I was receiving it for, yes, but I intended to pay it right out. I was building for the future. It may be a silly way to put it but I had no intentions of keeping this money."

And again at page 1168:

"Q. And you got all the money of these 128 checks?

"A. Where these names are on, yes."

The facts surrounding the fictitious payee commission checks were so obscure as to require Bublemhort's detailed explanation. After that subject was covered, the deposition was curtailed because of his critical condition.

Furthermore, while the government had been ordered to provide petitioner with a bill of particulars (R. 10), it did not do so until after Bublemhort's deposition and death. (R. 11.) When the deposition was taken petitioner did not know that gross receipts would comprise part of the government's proof. The indictment alleged understatement of net income (R. 5, 6.) and, in 1948, petitioner had learned of the fictitious payee commission checks and had ordered Bublemhort to stop the practice. (R. 171 1155, 1254.) These were the circumstances which caused defense counsel to limit the interrogation to the commission checks.

The government's argument is addressed to the *weight* of Bahlenhorst's written affidavit statement; it is not addressed to its *admissibility*. The affidavit was admissible as a declaration against interest. More important, any objection to its contents could have been "obviated" within the meaning of the Federal Rules of Civil Procedure, if objection had been made at the deposition hearing. The affidavit should have been received in evidence and petitioner was grievously prejudiced by its exclusion.

2. The trial court abused its discretion in refusing to sever the corporate counts from the personal counts.

The government's answer to this assertion reveals an understandable ignorance of the record. We appreciate that government counsel in this Court has not participated in the proceedings below and has been obliged to study a voluminous record in a short period of time. Nonetheless, the assertion that "the proof of each [crime] revolved almost entirely around the corporation's sales of automobiles" (Br. opp. 11, 12) is totally inaccurate. The corporate counts were predicated upon alleged unreported gross proceeds from the sales of corporate automobiles and alleged improper deductions predicated upon the fictitious payee commission checks, of which Bahlenhorst was the recipient of the proceeds.

The personal counts were predicated upon the sale of cars concededly owned by petitioner personally, and upon petitioner's personal deductions.

There is not *one* transaction in over 1400 pages of testimony adduced over a three week period of time which tends to prove both the corporate and personal charges. There is not a *single* common transaction. Virtually, all of the government's proof on the corporate counts was adduced

by one set of witnesses and all of its proof on the personal count by a second set of witnesses. The proof of each crime did not revolve around the same transactions. Accordingly a severance should have been granted.

CONCLUSION.

For the reasons given here and in the petition for writ of certiorari, it is respectfully submitted that this case is one which justifies the issuance of this Court's writ of certiorari to review and reverse the judgment of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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